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CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

October Term, 1949

No. 393	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 394	A. C. CARROLL, *et al.*,	*Petitioners*
No. 395	S. T. ALRED, *et al.*,	*Petitioners*
No. 396	LOWELL E. WOMACK,	*Petitioner*
No. 397	S. T. ALRED, *et al.*,	*Petitioners*
No. 398	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 399	LOWELL E. WOMACK,	*Petitioner*

v.

CELANESE CORPORATION OF AMERICA,
Respondent

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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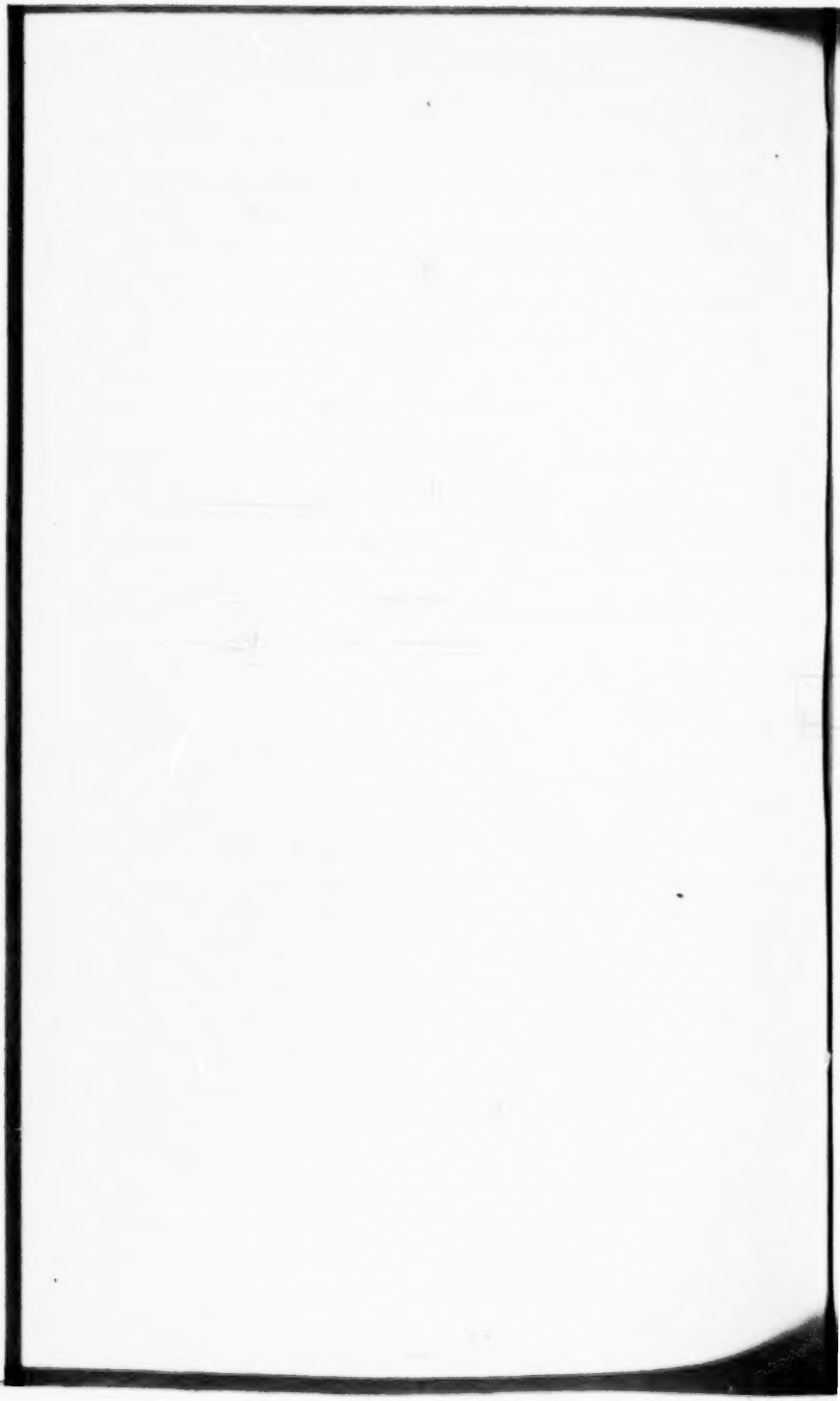
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CELANESE CORPORATION OF AMERICA,
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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

J. D. Pedigo and C. L. Ross in No. 393 (No. 16581 below), A. C. Carroll and H. D. Dodd in No. 394 (No. 16582 below), S. T. Alred, Chesley Gaines and W. S. Robertson in No. 395 (No. 16583 below) and Lowell E. Womack in No. 396 (No. 16584 below) pray that writs of certiorari issue to review the decisions (and the denial of the motions

for rehearings) of the Supreme Court of Georgia affirming as criminal contempts judgments of the Superior Court of Floyd County ordering the petitioners jailed and fined for civil contempt of a temporary restraining order, issued without notice, regulating picketing in a labor dispute.

S. T. Alred, Chesley Gaines and W. S. Robertson in No. 397 (No. 16596 below), J. D. Pedigo, C. L. Ross, A. C. Carroll and H. D. Dodd in No. 398 (No. 16597 below) and Lowell E. Womack in No. 399 (No. 16598 below), pray that writs of certiorari issue to review a decision (and the denial of a motion for rehearing) of the Supreme Court of Georgia affirming judgments of the Superior Court of Floyd County denying petitioners' petitions for permanent stays of execution of judgments in civil contempt, which petitions were based on the grounds that the prior judgments in civil contempt must be permanently stayed since the strike had been settled and the main cause had been dismissed and had become moot.

Opinions Below

The opinions of the Supreme Court of Georgia appear as follows:

No.	No. Below	Citation	Record
393	16581	205 Ga. 392	51
394	16582	205 Ga. 493	120
395	16583	205 Ga. 499	178
396	16584	205 Ga. 514	233
397	16596	205 Ga. 371	308
398	16597	205 Ga. 371	308
399	16598	205 Ga. 371	308

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3). The decisions were rendered on the following dates: In No. 393 (No. 16581 below), No. 397 (No. 16596 below), No. 398 (No. 16597 below) and No. 399 (No. 16598 below) on May 13, 1949 and the motions for rehearings were denied on June 15, 1949; in No. 394 (No. 16582 below), No. 395 (No. 16583 below) and No. 396 (No. 16584 below) on June 15, 1949 and the motions for rehearings were denied on June 28, 1949. Various temporary stays of executions and withholdings of remittiturs were granted by the courts below. The petitioners are at liberty pending final determination of the actions. By order of the Chief Justice of this Court, dated September 1, 1949, petitioners' time for filing of this petition was extended to and including October 14, 1949.

1. The petitioners contend that the contempts were civil contempts, as certified by the Superior Court of Floyd County which found the petitioners to have violated the temporary restraining order of that court, and that when the strike was settled and the main cause became moot and was dismissed, any execution of the prior judgments, there then being in existence no restraining order, case, controversy or litigation of any kind or character before the court, would be without any process of law, in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions, and amendments thereto, in the trial court, to permanently stay the execution of the contempt judgments (R. pp. 246, 256, 270, 278, 291, 297). The amendments are printed in the record following the

orders of the court denying the petitions, but it is clear from the certified Bills of Exceptions that the amendments were filed and considered by the trial court prior to the issuance of the orders (R. pp. 262, 284, 304). The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. section 1257 (3).

2. Only by decision of the Supreme Court of Georgia did the petitioners learn that the contempt proceedings were criminal rather than civil. The Supreme Court of Georgia, in order to arrive at its decision, specifically reversed a prior decision of that Court, holding that such contempts were civil rather than criminal, said prior decision being the law of Georgia at the time that the Superior Court of Floyd County found that the petitioners had committed civil contempt. The change in the nature of the proceedings from civil to criminal, by the decision of the appellate court, did not fairly inform the petitioners of the charges against them, did not allow them an opportunity to defend the charge first made in the appellate court, resulted in a conviction upon a charge never made in the trial court and was a retroactive operation of the decision of the Supreme Court of Georgia in the instant case, in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions for rehearing. The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. Section 1257 (3).

3. Petitioners contend that if the contempts are criminal, a certification by the trial court that the evidence preponderated against them and the absence of a finding that they were guilty beyond a reasonable doubt was in violation

of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions for rehearing. The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. 1257 (3).

4. The petitioners contend that if the contempts are criminal they were denied the right of confrontation of witnesses against them in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States in the petitions for rehearing. The decisions below in this regard are therefore reviewable by writs of certiorari under 28 U. S. C. 1257 (3).

The jurisdiction of the Court more fully appears from the Statement and the Reasons for Granting the Writs.

Questions Presented

1. Whether a judgment in civil contempt, rendered while the main cause was pending, for violation of an order regulating picketing and other strike activities, may be executed after the strike has been settled, the plaintiff no longer needs or requests relief, the main cause has become moot and has been dismissed, there then being no order, cause, litigation, case, controversy or judicial proceeding of any kind or nature before the court, without depriving the petitioners of due process of law.

2. Whether it is a deprivation of due process of law for an appellate court to affirm, as criminal contempts, judgments in cases which were tried as civil contempts and in which the trial court certified that the petitioners were

"adjudged . . . guilty of civil contempt", if the petitioners had no knowledge of the criminal nature of the proceedings, were not tried in criminal contempt and necessarily could not defend themselves against any charge of criminal contempt and if the essential and distinguishing ingredient of criminal contempt, wilful defiance of the authority of the court, was never in issue.

3. Whether a judgment in civil contempt can be affirmed by an appellate court as a judgment in criminal contempt in the face of a certification by the trial judge that the petitioners "were heard . . . according to the rules of evidence and procedure in civil cases and at said hearing the Honorable Trial Judge found the evidence to preponderate against the petitioners" and in the absence of a finding that they were guilty of criminal contempt beyond a reasonable doubt, without depriving the petitioners of due process of law.

4. Whether a judgment in civil contempt can be affirmed by an appellate court as a judgment in criminal contempt in the absence of a confrontation of witnesses against the petitioners in the trial court without depriving them of due process of law.

Statement

Textile Workers Union of America, C. I. O., a labor organization representing respondents' employees, engaged in a strike at the respondent's plant in Rome, Georgia. All of the petitioners are members of that Union. Respondent did not attempt to operate its plant until October 26, 1948. On October 25, 1948 respondent filed a petition in equity in the Superior Court of Floyd County, Georgia, against

certain of its employees and certain members of the Union, and on the same day there was issued, without notice to the defendants, a temporary restraining order prohibiting and regulating certain anticipated picketing and other strike activities of the defendants. (Although a preliminary injunction was issued on December 2, 1948, all the citations for contempt ante-dated and are based upon violations of the temporary restraining order.)

Petitioners seek review of the judgments for contempt of the temporary restraining order in No. 393 (No. 16581 below), No. 394 (No. 16582 below), No. 395 (No. 16583 below) and No. 396 (No. 16584 below). Only three citations for contempt are involved in those four cases. These citations appeared as separate motions on the docket of the Floyd County Superior Court but all "sounding in the same cause as the aforesaid petition for injunction" (R. pp. 8, 78, 156, 202) clearly revealing the ancillary character of the citations. Petitioners Pedigo and Ross, cited in the first citation, were tried separately in No. 393 (No. 16581 below). Petitioners Carroll and Dodd, also cited in the first citation, were tried separately in No. 394 (No. 16582 below), thus accounting for four cases involving three citations.

The trial judge certified in the Bills of Exceptions that the petitioners were "adjudged . . . guilty of civil contempt" (R. pp. 47, 158, 205),[1] and that the cases "were

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[1] That language appeared only in No. 393 (No. 16581 below), No. 395 (No. 16583 below) and No. 396 (No. 16584 below, although it is clear from the Bill of Exceptions in No. 398 (No. 16597 below), involving the motion to stay the judgments in Nos. 393 and 394 (Nos. 16581 and 16582 below), that the proceedings were identical (R. pp. 280, 281).

heard . . . according to the rules of evidence and procedure in civil cases and at said hearing the Honorable trial judge found the evidence to preponderate against" the petitioners (R. pp. 258, 259, 281, 301). From the judgments finding petitioners guilty of civil contempt, appeals were taken.

On December 8, 1948 the Union and the respondent settled the strike. As part of the strike settlement, the respondent agreed to the dismissal of the petition for injunction and of all citations for contempt that had not been adjudicated and further agreed not to oppose, in the trial court, motions for permanent stays of execution of the contempt judgments. On December 17, 1948, the trial judge entered an order of dismissal as follows:

> "The within case is hereby dismissed together with all citations for contempt of Court not yet tried, except that the same is not dismissed and the Court hereby expressly retains jurisdiction of said cause insofar as it pertains to citations for contempt of Court docketed as numbers 3234,[2] 3249 and 3258 and to those respondents in said citations who have been adjudged guilty of contempt of Court . . . and said cause as to said cases for respondents is not dismissed" (R. p. 246).

Thereafter the petitioners petitioned the trial court for permanent stays of execution of the contempt judgments on the ground that, being ancillary proceedings in civil contempt, they must fall with the mootness and dismissal of the main cause. These petitions for permanent stays were denied and appeals taken. The motion for permanent stay in No. 398 (No. 16597 below) was with respect to the

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[2] Incorrectly copied in the decision of the Supreme Court of Georgia as 3232 (R. p. 317).

contempt judgments in Nos. 393 and 394 (Nos. 16581 and 16582 below); in No. 397 (No. 16596 below) with respect to No. 395 (No. 16583 below); in No. 399 (No. 16598 below) with respect to No. 396 (No. 16584 below).

By the consolidated decision of the Supreme Court of Georgia in Nos. 397, 398 and 399, (Nos. 16596, 16597 and 16598 below) it was first learned by the petitioners that the contempt proceedings were criminal rather than civil. The petitioners had believed that they were tried for civil contempt. That was surely the understanding of the trial judge and it must have been the understanding of the respondent inasmuch as the respondent at no time objected to the trial judge's certifications to that effect in the Bills of Exceptions, nor did it answer or demur to the petitions for permanent stays and amendments thereto, reciting the civil nature of the contempts, although such opportunity was afforded by the trial judge.

The contempts became criminal by decision of the Supreme Court of Georgia but only by virtue of that Court's specific reversal in its decision in the instant cases (R. p. 319) of its decision in *Wagner* v. *Commercial Printers,* 203 Ga. 1, a case which held that a contempt proceeding such as in the instant cases was civil rather than criminal. (The *Wagner* case had been appealed to the Supreme Court of Georgia on the ground that the contemnors had not been proved guilty beyond a reasonable doubt. The court held that the reasonable doubt rule did not apply because the contempt was civil.) Thus the law of Georgia was changed after the trials in the instant cases and was made applicable retroactively to the instant cases despite the fact that the petitioners had not been tried for criminal contempt.

A large proportion of the evidence at the contempt hearings was presented by the respondent in affidavit form. Proceeding on the assumption, which was also the assumption of the trial court and the respondent, that the contempts were civil, the contemnors did not, of course, challenge the right of the respondent to present most of the evidence by affidavits. Some of the witnesses against the petitioners were cross-examined orally. In the motions for rehearing, however, having learned that the civil contempt had been converted into a criminal contempt by the decision of the Supreme Court of Georgia, the petitioners made timely objection to the evidence in affidavit form on the ground that they were denied the right of confrontation of the witnesses against them.

Reasons for Granting the Writs

What was at one time the extraordinary writ of injunction has now become in the state courts a commonplace process for the attempted resolution of labor disputes. The inevitable contempt proceedings following the issuance of the writ, indeed the writ itself, can rarely be scrutinized by this Court because the dispute often becomes moot and the contempt punishments are executed before review may be had. And it is not often that petitioners, associated with the trade union movement, can afford what is to them the enormous expense that litigation of this type entails. The instant record provides the Court with an unusual opportunity to examine, from the perspective of the Fourteenth Amendment, the practices and procedures in contempt proceedings that have now blanketed a wide area of industrial disputes. The state courts have not followed the decisions

of this Court, perhaps because the federal statutory protections in contempt proceedings have obscured for those courts the decisions of this Court on the constitutional questions involved in contempt cases. Whatever the reason, it nevertheless remains that in the state courts the obfuscatory Latin rationalization that contempt proceedings are "sui generis" has served to perpetuate the obscenities of Star Chamber and the excresences of Wilmot's undelivered opinion in *Almon's case* (Fox, *Contempt of Court*) to the exclusion of what this Court has considered to be "implicit in the concept of ordered liberty", *Palko* v. *Connecticut,* 302 U. S. 319, 325.

1. At this point in stating our reasons, we proceed upon the assumption that the contempts were and must remain civil and that the arbitrary failure of the Supreme Court of Georgia to observe the distinction between civil and criminal contempt cannot foreclose this Court from the determination of whether the contempts were civil or criminal, since substantial constitutional rights of the petitioners depend upon the preservation of that distinction, *Scott* v. *McNeal,* 154 U. S. 34, 45, 46; *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 234; *Coombes* v. *Getz,* 285 U. S. 434, 441.

While the judgments of contempt may have been rendered when the Trial Court may have had jurisdiction of the main cause, the petitioners are now threatened with jail and fines for civil contempt of an order that is no longer in existence, which was issued in an injunction action that is no longer pending, which in turn grew out of a strike that has been settled. Under such circumstances the refusal to stay execution is patently arbitrary and wholly

without process of any law, since the only purpose of a civil contempt proceeding is to coerce the contemnor for the benefit of the plaintiff in the main cause. That civil contempt judgments must fall when the plaintiff either no longer needs or is not entitled to relief by way of coercive punishment of the contemnor, has always been the law,[3] and we have been unable to find any case to the contrary.

The main cause became moot and was dismissed.[4] The order issued in the main cause could not, after mootness and dismissal of the main cause, be attacked. By operation of law the petitioners were deprived of the right of any appellate review in any court of the order which it is claimed they have violated and for which civil liability was imposed by way of the contempt judgments; petitioners could not attack the order collaterally or otherwise. This, if nothing else, lays bare the want of jurisdiction in the trial court to execute the judgments for civil contempt, although it would be otherwise if the contempt were criminal. In this

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[3] *Howard* v. *Durand*, 36 Ga. 346, 360; *United States* v. *United Mine Workers of America*, 330 U. S. 258, 294, 295; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 451, 452; *Leman* v. *Krentler-Arnold Hinge Co.*, 284 U. S. 448, 453; *Worden* v. *Searles*, 121 U. S. 14, 25; *Salvage Process Corp.* v. *Acme Tank Cleaning Corp.*, 86 F. 2d 727; *S. Anargyros Inc.* v. *Anargyros & Co.*, 191 Fed. 208; *In re Fanning*, 40 Minn. 4; *Western Fruit Growers' Assn.* v. *Bernardy*, 128 Minn. 153; *Kaehler* v. *Dobberpuhl*, 56 Wis. 497; *Brunson* v. *Brunson*, 91 S. C. 411; *People ex rel. Hess* v. *Finn*, 176 Misc. 402.

[4] The statement in the opinion of the Supreme Court of Georgia in No. 393 (No. 16581 below) that the order "is still outstanding; never having been reviewed or set aside . . ." (R. p. 57) is refuted by that Court's quotation in its opinion in Nos. 397, 398, and 399 (Nos. 16596, 16597 and 16598) of the trial judge's order that "The within case is hereby dismissed . . ." except with respect to those found guilty of contempt (R. p. 317).

perspective the want of due process results from the want of jurisdiction, there being no *lite pendente, Pennoyer* v. *Neff*, 95 U. S. 714, *Scott* v. *McNeal, supra.* Such want of jurisdiction is not dependent upon non-residence, *Griffin* v. *Griffin,* 327 U. S. 220, 228, nor upon the later application of the full faith and credit clause, *Riverside & Dan River Cotton Mills* v. *Menefee,* 237 U. S. 189, 196, 197, and may appear at later stages in the litigation, *Wetmore* v. *Karrick,* 205 U. S. 141. And if there is lack of jurisdiction a contempt proceeding, no matter at what stage, is *coram non judice* and lacks due process, *Ex parte Rowland,* 104 U. S. 64, *Ex parte Fiske,* 113 U. S. 713, *Ex parte Sawyer,* 124 U. S. 200.

The want of jurisdiction of civil contempt may not be cured by the mere assertion that the contempt is criminal. The preservation of the distinction between criminal and civil libel, for example, is not merely a matter of sound technical practice. *A fortiori* between criminal and civil contempt, since, as will appear in the reasons *infra,* they are as dissimilar as any two types of actions can be. Criminal contempt is brought to punish for defiance of judicial authority, civil to coerce the contemnor for the benefit of the plaintiff. The proof of criminal contempt, by the very nature of the action, must include proof of the wilful defiance which is not an element of civil contempt. While we know of no case directly holding that the state courts must constitutionally preserve the distinction between criminality and civil liability, we are persuaded that to ignore the distinction deprives both contemnors and plaintiffs, as the case may be, of substantial constitutional rights.

Highlighting the necessity for the preservation in the state court of the distinction between the two types of con-

tempt is the problem that would arise on removal to a federal court (as was done in the main cause because the complaint specifically stated a federal question, although the removal proceeding is not here of record and the remand is not complained of). The state court order would remain in effect after removal, 28 U. S. C. Sec. 1450, if there were no remand. The federal court would have jurisdiction of civil contempts committed before and after removal but only of criminal contempts committed after removal. The state court would have no jurisdiction of civil contempts committed before or after removal but would have jurisdiction of criminal contempts committed before removal. It would be a denial of due process, therefore, if a state court were to proceed upon a contempt committed before removal, asserting jurisdiction on the erroneous theory that it might classify as a criminal contempt what was actually a civil contempt. Under such circumstances it could not be claimed that the classification of contempts is wholly a matter of state practice into which this Court may not inquire. Nor is the constitutional preservation of the distinction between the two types of contempt proceedings wholly for the benefit of alleged contemnors. A plaintiff may not be deprived of due process of law by the exercise of executive clemency with respect to a civil contemnor, *Ex parte Grossman,* 267 U. S. 87, 111, 121. The court noted that

> "long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemner for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part

> of the court's order necessary to secure the rights of the injured suitor.
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> • • •
>
> "A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's rights."

Nor may the civil character of the contempt, essential to the petitioner's argument on the point of arbitrariness and lack of jurisdiction, be lost to them because the Supreme Court of Georgia decided that the case must have been criminal since a criminal punishment was imposed. It is wholly without significance that the character of the punishments may have been vindictive in the criminal sense rather than coercive in the civil sense. If the type of punishment were to determine the type of proceeding that was brought, *ex post facto,* then to Anglo-American jurisprudence there would be imported a new doctrine, unknown to Gilbert and Sullivan, to let the crime fit the punishment. The Chief Justice in his opinion in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 297, specifically rejected this boot-strap reasoning. Accord: *Penfield Co.* v. *Securities & Exch. Com.,* 330 U. S. 585, 595, *Michaelson* v. *United States,* 266 U. S. 42, 65.

In sum, therefore, it is arbitrary and wanting in jurisdiction, thus lack of due process, to execute contempt judgments in a civil contempt when there is no relief to which the plaintiff is entitled nor any cause pending in which the plaintiff seeks relief.

2. At this point and the sequential points, in stating our reasons, we assume, *arguendo* only, that the contempts

are criminal. Since the trial judge and the parties acted upon the the assumption that the proceedings were for civil contempt, the decision of the Supreme Court of Georgia that they were criminal deprived the petitioners of due process because they had no notice of the criminal nature of the proceedings, were not tried for criminal contempt, necessarily could not defend themselves against that charge and necessarily could not have been found by the trial judge to have committed criminal contempt because the essential and distinguishing ingredient of criminal contempt was never in issue before the trial court.

Here, again, the distinction between civil and criminal becomes of constitutional significance because of the lack of notice and the allied rights. Although some of the verbal or physical acts may constitute elements of both criminal and civil contempt, it nevertheless remains that there must always be differences of substance between the crime and the ancillary civil proceeding. So clear was it to Holmes, J., that criminal contempt in violation of a labor injunction was a crime that "If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States,* 233 U. S. 604, 610. Contempt in the civil sense is a term of art but in the criminal sense it has its popular meaning—"the act of scorn or despising", *Winston Dictionary* (Coll. ed., 1943). The Chief Justice states it well in his opinion in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 303:

> "One who defies the public authority and willfully refuses obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful

> and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future."

Since the proof of criminality, in a sense *mens rea,* is a condition precedent to conviction for criminal contempt and is its essential and distinguishing ingredient by the very nature, purpose and definition of the action, there could have been no notice to, or opportunity to defend by, the contemnors nor consideration of the elements of criminal contempt by the trial judge in his finding if the trial judge and the parties proceeded upon the assumption that they were engaged in the trials of ancillary proceedings in civil contempt and if the trial judge certified that the proceedings were such. The right to notice and the right to defend on the charge on which guilt is found and the right only to be found guilty by the trial court on the charge considered by it, are separately guaranteed both in the state and federal courts on charges both of criminal contempt and crimes. *Re Oliver,* 333 U. S. 257, 273; *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 446; *Cooke* v. *United States,* 267 U. S. 517, 537; *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *DeJonge* v. *Oregon,* 299 U. S. 353, 362; *Cole* v. *Arkansas,* 333 U. S. 196, 201; *United States* v. *Cruikshank,* 92 U. S. 542, 569; *Holden* v. *Hardy,* 169 U. S. 366, 389, 399.

We advert again to the point made *supra* that the mere fact that criminal punishment was imposed by the trial judge can not be given retroactive effect so as to render the proceedings criminal *ab initio.* Making the crime fit the punishment does not substitute for notice or the opportu-

nity to be heard or the consideration by the trial judge, in his finding of guilty, of the esesntial ingredient of the crime.

In the opinion of the Supreme Court of Georgia was contained the first notice the petitioners had that they were charged with criminal contempt. In order to give such notice to the petitioners, albeit retroactively, that Court candidly reversed its decision in *Wagner* v. *Commercial Printers, supra.* While the principle of *stare decisis* does not give litigants vested rights in judicial opinions, such retroactive operation of the decision of the Supreme Court of Georgia in reversing a prior decision may not excuse a denial of a constitutional right, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673.

3. We next come to what the Chief Justice in his opinion in the *Mine Workers* case referred to as the "enhanced protections accorded defendants in criminal contempt proceedings."[6] Surely one of those enhanced protections constitutionally required is that the presumption of innocence must be rebutted by proof beyond a reasonable doubt. Such proof is constitutionally required in criminal contempt cases in the federal courts, *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 444; *Michaelson* v. *United States,* 266 U. S. 42, 66, cited with approval on this point in the *Mine Workers* case; *Oriel* v. *Russell,* 278 U. S. 358, 364; *Western Fruit Growers, Inc.* v. *Gottfried,* 136 F. 2d 98, 101; in criminal cases in the federal courts, *Warszower* v. *United States,* 312 U. S. 342, 347, 348; in criminal cases in the state courts, *Cockrill* v. *California,* 268 U. S. 258, 261; *Bailey* v. *Alabama,* 219 U. S. 219, 234.

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[6] 330 U. S. 258, 298, footnote omitted.

Until the decision in the instant cases that was also the law of Georgia in criminal contempt cases, *Wagner* v. *Commercial Printers*, 203 Ga. 1, 7, *Drakeford* v. *Adams*, 98 Ga. 722, 725. The *Drakeford* case was specifically reversed by the Supreme Court of Georgia in its opinion (R. p. 58) in No. 393 (No. 16581 below). (It is of interest that *Drakeford* v. *Adams* was cited with approval in *Gompers* v. *Buck's Stove & Range Co.*) The Supreme Court of Georgia held that the doctrine of the *Drakeford* case was no longer applicable and that reasonable doubt was not not required in criminal contempt cases in Georgia because it was not part of the law of England at the time of the Georgia reception statute. That statute can not, of course, determine the rights of the petitioners under the Fourteenth Amendment. It was specifically held by this court that the guarantees of the Fourteenth Amendment were not dependent upon the reception of English law, *Powell* v. *Alabama*, 287 U. S. 45, 60. If Holmes was right to the extent that criminal contempts are crimes then the reasonable doubt rule, constitutionally required in criminal contempts and in crimes in the federal courts as well as in crimes in the states courts must also be required in criminal contempts in the state courts. To adopt the reasoning of the Supreme Court of Georgia would be to adopt the theories of Star Chamber and of Wilmot, J.; see Fox, *Contempt of Court* and Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts*, 37 Harv. L. R. 1010. On the question of the timely raising of this point, see our discussion *infra*.

4. We direct attention to another "enhanced protection" guaranteed in criminal cases. The defendant's

right to be confronted by the witnesses against him has a dual purpose. Not only was it intended to prevent the conviction of defendants upon depositions or *ex parte* affidavits but also to test the recollection of witnesses in the exercise of the right of cross examination, *Dowdell* v. *United States,* 221 U. S. 325, 330. "The right of confrontation did not originate with the provision of the 6th Amendment, but was a common law right . . .", *Salinger* v. *United States,* 272 U. S. 542, 548. This Court has held that contemnors in a criminal contempt proceeding in a state court have the right of confrontation, *Re Oliver,* 333 U. S. 257, 273, evidently overruling *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31 on this question.

To our knowledge, this is still the law of Georgia, *Warner* v. *Martin,* 124 Ga. 387, 390, *Carson* v. *Ennis,* 146 Ga. 726. In the *Carson* case, the holding that criminal contempt proceedings may be based upon affidavit (p. 728) means merely that such proceedings may be initiated by affidavit instead of by an information. The court indicated that the proper procedure thereafter was that the court should "proceed to hear testimony in the usual way" (p. 729). We do not know why the Supreme Court of Georgia did not pass upon this point. It was raised in the petitions for rehearing; that was the first time that the petitioners learned of the criminal nature of the contempts. That was the proper time to raise that question, as well as any other questions relating to the criminal nature of the proceedings, *Cole* v. *Arkansas,* 333 U. S. 196. It may be that the Supreme Court of Georgia believed this point to lack substance because some testimony of the plaintiff's witnesses was oral and because the contemnors did not object to the use of affidavits. But this only highlights the fatal lack of

due process resulting from the lack of notice that the contempts were criminal. The contemnors could not have objected at the time of the trial of the contempt cases, inasmuch as the trial court and the parties believed that they were engaged in the trial of a civil contempt in which affidavits were admissible.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for the writs of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

No. 393	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 394	A. C. CARROLL, *et al.*,	*Petitioners*
No. 395	S. T. ALRED, *et al.*,	*Petitioners*
No. 396	LOWELL E. WOMACK,	*Petitioner*
No. 397	S. T. ALRED, *et al.*,	*Petitioners*
No. 398	J. D. PEDIGO, *et al.*,	*Petitioners*
No. 399	LOWELL E. WOMACK,	*Petitioner*

v.

CELANESE CORPORATION OF AMERICA,
Respondent

BRIEF ON BEHALF OF RESPONDENT

BARRY WRIGHT,
JACK ROGERS,
Counsel for Respondent.

Of Counsel
Wright, Rogers, Magruder & Hoyt,
Rome, Ga.

Rome Printing Company

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V.

CELANESE CORPORATION OF AMERICA,
Respondent

MOTION TO DISMISS

Now comes the respondent and moves to dismiss the petition for certiorari because the record as filed therein does not contain a true and correct copy of the record of the cases in the court below.

STATEMENT OF FACTS

On the 25th day of October, 1948, Celanese Corporation of America, the respondent herein, presented to the Judge of the Superior Court of Floyd County, Georgia a petition asking for an injunction (R. 135) against certain striking employees from carrying out their threats to engage in mass picketing in violation of the law of Georgia, and in other violence and intimidation.

The Judge the same day granted a temporary restraining order, and set the matter to be heard on the 30th of October (R. 142). At that time the hearing was continued or postponed.

On October 26, November 18 and November 25, 1948 the Company filed sworn statements as to violations of the injunction or temporary restraining order by the petitioners in this case, showing various acts which were alleged to constitute contempt of court, and asking that citation issue directed to the respondents requiring them to be and appear at a time and place stated, then and there to show cause, if any they could, "why they should not be adjudged in contempt of the orders and processes of the court and punished accordingly."

These citations for contempt of court were No. 3234, which is now cases No. 16581, No. 393 of this court; and No. 16582, No. 349 of this court; and petition for citation for contempt of court No. 3249, which is case No. 16583, No. 395 in this court; and petition for citation for contempt of court No. 3258, which is case No. 16584, No. 396 in this court.

The court issued orders, directed to the respondents, which is substantially the same in each of said cases; and which directed the respondents to show cause at a time and place fixed "why they should not be adjudged in contempt of the orders and processes of this court and punished accordingly."

Thereafter case No. 393 came on to be tried on the 17th day of November, and the respondents were then "found guilty of contempt of the order of this court as alleged in the within petition for citation," (R. 5), and were then ordered "to pay to the proper officer of

this court a fine of $200.00, and that each be confined in the jail of said county for twenty days."

On the 18th day of November case No. 394 came on to be heard, and after hearing the evidence and argument of the counsel the court found the respondents "guilty of contempt of the order of this court as alleged in the within petition for citation," (R. 76), and sentenced them to a fine of $100.00 and ten days in jail, the fine to be paid to the proper officer of the court.

And on the 16th day of December, 1948 case No. 395 came on to be heard, and the court found certain of the respondents therein "guilty of the order of this court as alleged in the within petition for citation" (R. 150), and imposed various sentences, some a combination of a fine and jail sentences, others a fine. The fines in each instance to be paid to the proper officer of the court.

And in case No. 396 the court also found the respondents "guilty of the orders of this court as alleged in the within petition for citation for contempt of this court" (R. 197), and imposed fines and jail sentences as in the other cases.

Thereafter the respondents filed bills of exceptions to the judgments of contempt to review the cases solely on the merits and on the overruling of the demurrers of the defendants.

The strike was settled by the parties on December 8, and a stipulation of settlement was entered into by the said parties. A portion of said stipulation is as follows:

> "7. The company will ask that the petition for injunction and all citations for contempt of court filed in the Superior Court of said County not yet heard by the court be dismissed with one half the costs . . .

"8. The Company will neither oppose nor propose modification, withdrawal or stay of sentences on those already adjudged in contempt of court, but if the Judge of the Superior Court refuses to modify, withdraw or stay such sentences the company will file briefs in the appellate courts in support of its original contentions in such cases. Court costs in such cases shall be determined by the court." (R. 254.)

Thereafter the court entered an order (R. 246) dismissing the citations not yet tried and dismissing the petition for injunction, except as to cases No. 3234, 3249 and 3258 (393, 394, 395, 396), and to those respondents in said citations who have been adjudged guilty of contempt of court. Said order being as follows:

"The within case is hereby dismissed, together with all citations for contempt of court not yet tried, except that the same is not dismissed, and the court hereby expressly retains jurisdiction of said cause insofar as it pertains to citations for contempt of court docketed as No. 3234, 3249 and 3258, and to those respondents in said citations who have been adjudged guilty of contempt of court and on whom sentence has been passed, to-wit: (here the respondents who have been adjudged guilty of contempt of court were named. The names of the petitioners herein were all included in this order.), and said cause as to said cases and respondents is not dismissed. This 17th day of December, 1948.

"H. E. Nichols, J. S. C. R. C."

It will be observed that respondent here did not agree to dismiss the main case or citations that had not been heard at that time, but simply agreed that the company will "*ask*" that the petition for injunction and all citations for contempt of court *not yet heard* be dismissed.

And that by paragraph 8 of this stipulation provided that *the company would take no stand* on the question of modification, withdrawal or stay of sentence on those already convicted and sentenced.

It is to be observed that *the court refused to dismiss the case, but* on the other hand *expressly retained jurisdiction* of the case insofar as it pertained to these respondents and the cases in which they were convicted of contempt.

The petitioners then filed their petitions for stay of sentence and judgment, and it is obvious that the court did not consider the sentences that it had passed as being sentences for civil contempt, for had the court considered the contempts as civil then certainly the court would have permitted dismissal of all citations, the withdrawal of the sentences and would have granted the petitions to permanently stay the sentences, and so on.

The court upon hearing the petitions to permanently stay passed an order denying them on the 7th day of January, 1949, and thereafter bills of exceptions were duly filed. The case was then carried to the Supreme Court of the State of Georgia, and decided by that court on May 13, and June 15, 1949.

The petitioners here filed motions for rehearing, which were denied.

QUESTIONS OF JURISDICTION

The respondents bring this petition for certiorari, complaining that they have been denied due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States in four particulars.

First: That the contempts were civil contempts, and that when the strike was terminated the cause became moot, (At this point we wish to respectfully call the court's attention to a misstatement on page 3 of the petitioner's brief—"The main cause became moot and was dismissed."—as this is not a correct statement. The order of the court "expressly retains jurisdiction".) and that to execute the judgment of contempt after the main cause became moot would deprive the petitioners of due process of law.

Second: That only by the decision of the Supreme Court of Georgia did the petitioners learn that the contempt proceedings were criminal rather than civil, and that therefore they were not informed of the nature of the charges against them and did not allow them an opportunity to defend the charges made against them.

Third: That if the contempts were criminal, a certification by the trial court that the evidence preponderated against them and the absence of a finding that they were guilty beyond a reasonable doubt was in violation of due process of law.

Fourth: That if the contempts were criminals, they were denied the right of confrontation of witnesses against them in violation of due process of law.

The first claim was set up in the petition to stay the sentences. The second, third and fourth claims were set up in the petitions for rehearing.

It, therefore, appears that the only claims of jurisdiction for this court is the violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

CITATION OF AUTHORITIES

Due process of law in the state courts is regulated by the law of the state. In this respect, this court in an opinion by Mr. Justice Waite stated:

> "Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art. VI. Const. Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."
>
> Walker v. Sauvinet, 92 U. S. 90; 23 L. Ed. 678, 679.

The question of due process of law is for State determination and not for determination by this Court. What is for determination by this Court is as stated by this Court in an opinion by Mr. Justice Van Devanter in the case of Herbert v. State of Louisiana, 272 U. S. 312, 316; 71 L. Ed. 270, 273:

> "Whether State statutes shall be construed one way or another is a State question, the final decision of which rests with the courts of the State. The due process of law clause in the 14th Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the State Courts on questions of State law. What it does require is that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and jus-

> tice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' "

It would, therefore, seem that the only question in this case is whether or not the action of the State Courts was inconsistent with the fundamental principles of liberty and justice as stated above.

If the action of the State Court is consistent with the fundamental principles of liberty and justice, then this Court has no jurisdiction.

We will, therefore, discuss this in order of the jurisdictional claims as set out in the petition.

First: Were the contempts of the main cause rendered moot by the settlement of the strike; so that the execution of contempt sentences would be inconsistent with the fundamental principles of liberty and justice?

Let us call the Court's attention to the order on the petition for injunction which the petitioner's contend dismissed the case (R. 246). It is as follows:

> "The within case is hereby dismissed, together with all citations for contempt of court not yet tried, except that the same is not dismissed, and the court hereby expressly retains jurisdiction of said cause insofar as it pertains to citations for contempt of Court docketed as Numbers 3234, 3249 and 3258 and to those respondents in said citations who have been adjudged guilty of contempt of Court and on whom sentence has been passed, to-wit: Joe D. Pedigo, J. L. Bowman, Troy Cline, Davis Whorton, E. J. Ellis, C. L. Ross, A. C. Carroll, H. D. Dodd, S. T. Alred, Chesley Gaines, Billie Marion Ingram, Joe Poole, W. S. Robertson, W. V. Smith, Hubert Summerville, Jack Thomas, Lowell E. Womack, Oscar T. Locklear, John Bolin, J. W. Williamon, Donald Pierce , and said cause as to

said cases and respondents is not dismissed.
"This 17th day of December, 1948.

"H. E. Nichols, J. S. C. R. C."

In the case of Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 451; 55 L. Ed. 797, 810, this Court said:

> "When the main case was settled, every proceeding which was *dependent on it, or a part of it, was also necessarily settled, of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings.* Worden v. Searls, 121 U. S. 27, L. Ed. 858, 7 Sup. Ct. Rep. 814. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the Court, with the public on one side and the defendants on the other, it could not in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation. (Italics supplied.)
>
> "But, as we have shown, this was a proceeding in equity, for civil contempt, *where the only remedial relief possible was a fine, payable to the complainant.* The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a settlement of all the differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part." (Italics supplied.)

There was no remedial relief in these contempt cases in favor of this respondent. The only possible sentence was a maximum fine of $200.00, payable to the State, and a maximum jail sentence of twenty days, either or both.

The Supreme Court of Georgia gave consideration to this case and to the difference in the two cases in its decision. The Court says (R. 326):

> "Without enumerating the many points of difference, we merely call attention to the conduct of the parties in the various Courts as outlined in that decision, and the prayers of the petition for citation in that case (Gompers v. Buck's Stove, etc.) as compared with the prayer in the instant case.
>
> "In the present case, the only prayer in the petition for citation was that the respondents show cause why they 'should not be adjudged in contempt of the orders and process of this court and be punished accordingly.' This prayer did not indicate that the plaintiff was asking that the respondents be punished as for a civil contempt."

The Court also said (R. 327):

> "Moreover, regardless of what may be the law in other jurisdiction, we are of the opinion that the procedure adopted in this case was a proper method under the law of Georgia for requiring respondents to answer for alleged criminal contempt. *A petition for rule nisi or citation brought by the original plaintiff, entitled in the main cause, has long been recognized in this state* as a proper method of procedure, even though it may appear that the alleged contempt arose in violation of an injunction and was criminal or quasi criminal in nature." (Italics supplied.)

In the case of United States v. United Mine Workers of America, 330 U. S. 258, 297; 91 L. ed. 884, 914, this Court held that criminal contempt was sufficiently charged when the petition alleged "a willful violation of the restraining order," and both petition and the rule to show cause inquired as to why the defendants

should not be "punished as and for a contempt of court."

This being a case brought in the Courts of the State of Georgia, subject to the laws of Georgia, the procedure of the State of Georgia governs.

Therefore, under the decision of the Supreme Court of Georgia, these contempt proceedings could not have been affected by any settlement between the parties to the equity cause made in this private litigation, as was stated in Gompers v. Buck's Stove and Range Co. (supra).

It was recognized by the parties at the time of the settlement of the strike on December 8, 1948, that the Celanese Corporation of America did not have the right to dismiss either the pending citation for contempt of court or to modify, vacate or suspend the execution of the sentences for conviction of contempt. Paragraphs 7 and 8 of the settlement agreement are as follows (R. 254):

> "7. The company will *ask* that the petition for injunction and all citation for contempt of court filed in the Superior Court of said County not yet heard by the court be dismissed with one half the costs . . ."
>
> "8. The company will neither oppose or propose modification, withdrawal or stay of sentence on those already adjudged in contempt of court, but if the Judge of the Superior Court refuses to modify, withdraw or stay such sentences the company will file briefs in the Appellate Courts in support of its original contentions in such cases. Court costs in such cases shall be determined by the Court."

The parties recognized at the time this agreement was made that these citations and convictions of con-

tempt were matters for the court and not the parties to pass on. That they were of a criminal nature and not a civil nature, and could not be dismissed by the parties.

We find no citation of authorities in the brief of the petitioners in support of their position that this case has, by the order (R. 246), become moot. We find no cases elsewhere holding such a case as this to be moot.

However, this Court has said in United States v. United Mine Workers of America, 330 U. S. 258, 294, 91 L. ed. 884, 913:

> "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, Worden v. Searls, 121 U. S. 14, 30 L. ed. 853, 7 S. Ct. 814 (1887) or though the basic action has become moot, Gompers v. Buck's Stove & Range Co."

Second: It is claimed in the petition for certiorari that the decision of the Supreme Court of Georgia holding the contempts to be criminal was retroactive, did not inform the petitioners of the charges against them, and therefore deprived them of due process of law.

The brief of plaintiffs contains a very forceful and binding statement of this Court, in the case of United States v. Mine Workers of America, 330 U. S. 258, 303:

> "One who defies the public authority and willfully refuses obedience, does so at his peril."

And again the petitioners say (page 16 of their brief):

> "So clear was it to Holmes, J., that criminal contempt in violation of a labor injunction was a crime that 'If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech.' " (Gompers v. United States, 233 U. S. 604, 610.)

It is respectfully submitted that all of the acts for which these parties were found guilty of contempt were willfully committed, with scorn and despising. We respectfully submit that such attitude is carried over into petitioners' brief when they say (on page 10) "What was at one time the extraordinary writ of injunction has now become in the state courts a commonplace process for the attempted resolution of labor disputes. *The inevitable contempt proceedings following the issuance of the writ . . .*" (Italics added.) Were it the intention to observe the injunction, to recognize the public authority rather than to willfully refuse obedience, to defy the public authority, the contempt proceedings *would certainly not be inevitable.*

This Court has held many times that the reversal of a former decision by a State Court to the prejudice of one party does not take away his property without due process of law.

This Court in Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 95, said:

> "Where the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States."

In Tidal Oil Co. v. Flanagan, 263 U. S. 444, 450, 68 L. Ed. 382, 385, the Court said:

> "The parties to this action have been fully heard in the State Court, in the regular course of judicial proceedings, and in such a case the mere fact that the State Court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law. This was ex-

> pressly held in the case of Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80."

And in Brinkerhoof-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680, 74 L. ed. 1107, 1113, this Court said:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

Therefore, it would certainly seem to be well established by this Court, that the overruling of an erroneous decision of the Supreme Court of the State of Georgia by that Court does not deprive these petitioners of due process of law under the Fourteenth Amendment of the United States Constitution, and does not confer any jurisdiction on this Court.

In any event, the only questions were:

a. Was the nature of the charges set out so as to give the petitioners notice of the charges against them?

b. Were the petitioners deprived of any right to defend?

a. The nature of the charge against each of the petitioners was clearly and distinctly set out in the petition for citation of contempt. Such petitions for cita-

tion fully and fairly informed the petitioners herein of the charges and the nature of the charges against them.

In the case of Pedigo and Ross, No. 393, in the petition for citation for contempt of court it was alleged (R. 1):

> "3rd. With knowledge of said restraining order, the said Pedigo and Ross willfully violated the same . . ."

and (R. 2):

> "In this way the said Pedigo and Ross collaborated together to induce strikers and union members to violate the terms of said order, and to show and exhibit contempt of this court and its process."

The prayer of the petition was (R. 3):

> "That citation issue directed to the respondents named herein, and to each of them, requiring them to be and appear at a time and place stated, then and there to show cause, if any they can, why they should not be adjudged in contempt of the orders and processes of this court and punished accordingly."

The order of the court issued and served on each of such respondents directed the respondents therein to (R. 3) show cause:

> "why they should not be adjudged in contempt of the orders of this court and punished accordingly."

As to Carroll and Dodd, Case No. 394, the petition for citation and the order of the court are one and the same as No. 393. The allegations as to Carroll and Dodd are (R. 2):

> "In direct violation of the restraining order and injunction granted in such proceedings . . ."

In Case No. 395 the allegations are as follows:

> "That an attorney for said plaintiff was present and told said named defendants that there was a restraining order by the Superior Court of Floyd County, Georgia restraining them from interfering with said train or from blocking the entrance to said plant. The said Alred then replied: 'We don't give a goddamn about any injunction, we ain't going to move. The train is bigger than we are and he can run over us if he wants to, but they ain't going to move this sign and you ain't either.'"

And continuing the allegations:

> "That all of said defendants were then, notwithstanding said injunction, massed in and on said tracks and did by force prevent said train from entering plaintiff's plant."

The prayers of the petition and the order of the court are practically identical with case No. 393 (R. 149-150).

In case No. 396, the allegations as to Lowell Womack are (R. 195) that "notwithstanding such restraining order and injunction," Womack did certain acts there set out, "in violation of said restraining order and in utter contempt of this court."

The prayers of the petition and the order of the court are practically identical with those of case No. 393 (R. 196).

To each petition for citation the respondents named filed demurrers, but none sought to attack the petition or the nisi for failure to inform of the charges against them or of the nature of such charges.

In an opinion delivered by Mr. Chief Justice Vinson, in the case of United States v. United Mine Workers of America, 330 U. S. 258, 296; 91 L. Ed. 884, 914, the Court said:

"The rule requires criminal contempt to be prosecuted on notice stating the essential facts constituting the contempt charged. In this respect, there was compliance with the rule there. Notice was given by a rule to show cause served upon defendants together with the Government's petition and supporting affidavit . . . The petition itself charged a violation of the outstanding restraining order, and the affidavit alleged in detail a failure to withdraw the notice of November 15, the cessation of work in the mines, and the consequent interference with the governmental functions and the jurisdiction of the court. *The defendants were fairly and completely apprised of the evidence and conduct constituting the contempt charge.* . . . The petition alleged a willful violation of the restraining order and both the petition and the rule to show cause inquired as to why the defendants should not be 'punished as and for contempt' of court. But nowhere was the contempt described as criminal as required by the rule.

"Nevertheless, the defendants were quite aware that a criminal contempt was charged."

In these cases now before the Court the petition alleged a willful violation of the restraining order, and both the petition and the rule to show cause inquired as to why the defendants should not be "adjudged in contempt of the orders and process of this court and punished accordingly."

43 Columbia Law Review, 780, 789, 790 (1943) contains an article on contempt of injunction, civil and criminal, in which it is said:

"It could be well argued that the use of the word 'punished' in the petition and rule to show cause was in itself adequate notice, for 'punishment' has been said to be the magic word indicating a proceeding in criminal rather than civil, contempt."

There was only one type of punishment possible in these cases. That is, the respondents in the contempt proceedings could only be punished by a fine payable to the State of Georgia and imprisonment. There was no punishment that could have been imposed that would have been for the benefit of the Celanese Corporation of America.

b. It is respectfully submitted that the procedure followed in this case was the procedure required by the State of Georgia, and was that followed in the cases prior to this. The only cases held to be civil contempt were where the remedy in the contempt proceeding was for the exclusive benefit of the plaintiff. Livingston v. Livingston, 24 Ga. 379, 383. And in Cobb v. Black, 34 Ga. 166, 167, the court said:

> "The object in this case is not to punish for an act done, in contempt of the court, but to compel the doing of an act necessary to the administration of justice."

These two cases recognize the distinction. In Drakeford v. Adams, 98 Ga. 722, 724, the court said:

> "A distinction is made between cases in which the proceeding is merely punitive and those in which it is remedial, that is to say in which the contempt consists in the refusal by a party to do something which he is ordered to do for the benefit or advantage of the opposite party, and he stands committed until he complies with the order. The substantial distinction, as stated by Judge Seymour D. Thompson, is, that 'one is a mode of execution of judgments and decrees in civil cases, while the other is punishment for an offense of a criminal nature.'"

It is true that the Supreme Court of the State of Georgia in Wagner v. Commercial Printers, 203 Ga.

held, in similar set of facts, that the contempt was civil. However, the court cited in that case the cases above cited, and states that:

> "Contempt may be civil or criminal. In the former, the proceeding in attachment is to enforce compliance with an order of court made for the protection of some right of the complaining party. In criminal contempt, the proceeding is to punish the offender for disrespect to or contumacious conduct towards the court."

In the case of Carson v. Ennis, 146 Ga. 726, 728, a proceeding to punish for the violation of an injunction, the court said:

> "It is apparent that the relator is not seeking to enforce any order made for the protection or enforcement of any private right, but to punish for alleged contumacious and disrespectful conduct towards the court in willfully disobeying the court's order. An attachment for a criminal contempt may issue to preserve the power and vindicate the dignity of courts, and to punish disobedience of their orders."

In the petition for citation for contempt no relief in behalf of the plaintiff in the injunction was prayed for. No remedy on behalf of the plaintiff in the injunction was prayed for. The only prayer was that the respondents show cause "why they should not be adjudged in contempt of the orders and processes of this court and punished accordingly."

This in itself, as stated in the United States v. United Mine Workers case, was sufficient to put the respondents on notice that they were charged with criminal contempt of court. If they acted on the belief that they were being charged with civil contempt of court in violating the orders of the court, then, as stated in this

same case of United States v. United Mine Workers, *they acted at their peril* and in utter disregard of not only the order of the court in this case, but in utter disregard of the greater number and weight of decisions of this state.

Certainly in view of the cases above cited the petitioners have not been deprived of due process of law by the Supreme Court of Georgia reversing a prior erroneous decision.

3. It is claimed that if the contempts are criminal that the certification by the trial court that the evidence preponderated against the respondents therein, and in view of the certification by the trial judge that the contempts "were heard . . . according to the rules of evidence procedure in civil cases, and at said hearing the Honorable Trial Judge found the evidence to preponderate against the petitioners," and in the absence of a finding beyond a reasonable doubt deprived the petitioners of due process of law.

The cases were not tried according to the rules of civil evidence and procedure and no such statement or certificate is contained in the bills of exceptions in cases No. 393 (16581), 394 (16582), 395 (16583) or 396 (16584) (R. 7-77-154-201). These are the cases wherein exception to the court's order finding and adjudging the petitioners herein guilty of contempt. It is to be noted that no assignments of error on the contempt orders themselves are set forth on this ground.

The Supreme Court of Georgia had this to say (R. 326):

> "It should be borne in mind that the allegations as to how the judge regarded the case, both in ruling upon evidence and in making up his decision,

> are contained in a mere petition for stay, and are not set forth as assignments of error upon the contempt orders themselves, or other judgment. Seemingly, they were made simply to reinforce the contention that the proceedings were civil contempt proceedings, but, in any view, the real character of the proceedings could not be altered by any allegation in the petition for stay as to how the trial judge may have regarded them."

There is nothing in the Fourteenth Amendment of the United States Constitution which requires proof of guilt beyond a reasonable doubt in cases of contempt of a state court tried in the state court. On the other hand, the Supreme Court of Georgia has held, in the case of Plunket v. Hamilton, 136 Ga. 72, 77, that:

> "While proceedings to attach for contempt which are punitive in their nature are sometimes spoken of as criminal, yet in many respects they are not strictly criminal cases, or subject to the rule of indictment, trial, sentence, and review, which apply to criminal cases strictly so-called."

And in the case of Carson v. Enis, 146 Ga. 726, 729, the Supreme Court of Georgia said:

> "While proceedings to attach for contempt which are punitive in their nature are sometimes spoken of as criminal, yet they are not subject in all respects to the rules of trial which apply to criminal cases, strictly so-called. Plunket v. Hamilton, 136 Ga. 72 (70 S. E. 781; 35 L. R. A. (N. S.) 583; Ann. Cas. 1912 B, 1259). Under the practice of criminal trials in this state, a defendant is permitted to make an unsworn statement, and is not subject to an involuntary cross examination. But an alleged contemnor is not entitled to this statutory right, which is given only to defendants on trial for crime preferred by indictment or accusation."

The criminal rules of trial, therefore, are not applicable in criminal contempt cases in Georgia, and proof beyond a reasonable doubt is not required.

The rule in Georgia is stated in Howard v. Durand, 36 Ga. 346, 359, and followed in Patton v. Miller, 190 Ga. 152, 195; in Corley v. Crompton-Highland Mills, Inc., 201 Ga. 333, 338.

The court said in Howard v. Durand (supra), at page 359:

> "It has often been decided that the actions of the Superior Courts in granting or refusing injunction will not be controlled except when it may appear there has been a flagrant abuse of discretion. The same rule should apply to the action of the courts relative to the punishment of parties alleged to be contumacious. Whether a contempt has been committed which should be punished, may generally be safely left to the discretion of the circuit judges."

The Court said in the Miller case:

> "In cases of contempt the trial judge is vested with a discretion in determining whether his orders have been violated and how such infringement should be treated; and it has been said that this court will not disturb his judgment unless it appears that he had abused his discretion."

The cases cited in the brief of the petitioners deal with contempt in Federal Courts, which are subject to the statutes of the United States and to the procedure prescribed for Federal Courts.

The case of Cockrill v. California, 268 U. S. 258, 69 L. Ed. 944, and Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191, cited by the petitioners, do not deal with any similar case at all, and have no application to the

present case. In the case of Bailey v. Alabama, the Court said, page 328:

> "This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Fongu Yue Ting v. United States, 149 U. S. 698, 749; 37 L. ed. 905, 925; 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary; and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue it has been held that such statutes do not violate the requirements of due process of law . . ."

In other jurisdictions it has been held that "the guilt of the accused must be established by clear and satisfactory evidence." Burtch v. Zench, 200 Iowa 49; 202 N. W. 542; 39 A. L. R. 1349, 1351. And a clear preponderance of evidence would suffice. State, ex rel. Havner v. Mullan, 185 Iowa 794, 171 N. W. 158. See in this connection the decision of the Supreme Court of Georgia on this question (R. 58, 59, 60, 61, 62), and Ex Parte Grossman, 267 U. S. 87, 117, 118, 122, 69 Law ed. 527, 534, 536, wherein the Court said:

> "Contempt proceedings are sui generis because *they are not hedged about with all the safeguards provided in the Bill of Rights for protecting one accused of ordinary crime from* the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts had been held to be inherently empowered to protect themselves and the function they perform by summary proceedings without a jury to punish disobedience of their orders and disturb-

ance of their hearings." (Italics supplied.)

and

> "The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the Bill of Rights offers to protect the individual against unjust conviction."

It therefore seems to be true that as the Supreme Court of Georgia said (R. 58), "We think the question before is one to be determined by the internal law of this State: Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 296, 85 L. Ed. 837 (10)."

The references to the Milk Wagon Drivers case is "The Supreme Court of the United States does not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties."

There is certainly no constitutional guaranty as contended by the petitioners.

4. They claim that if the contempts are criminal they were denied the *right* of confrontation of witnesses in violation of the due process of law clause.

This question was only raised in the motion for rehearing in the State Supreme Court, and was never urged at any time during the trial of any of the citations for contempt. Therefore, there is nothing in the record concerning the witnesses. The court must, therefore, presume that they were given the right to examine witnesses against them.

This Court held in In Re Oliver, 333 U. S. 257, 273; 92 L. ed. 682, 694, that:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard

> in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

This right to examine the witnesses was ever afforded the respondents in these cases. It is apparent from examination of the record that certain portions of the record in the Supreme Court of Georgia was not sent up, as required by Rule 38 of this Court, but was specifically deleted by the petitioners (see R. 359 (11) and R. 360 (10). Such portion so deleted would show that in at least one case all the witnesses against the respondents therein were cross examined by the respondents.

Since this question was never raised before, it does not seem timely now unless the respondent herein be given the opportunity of showing that the affiants in each case were in court either by request of the contemnors' counsel or by subpoenas, and were there for the purpose of being examined by the contemnors or contemnors' counsel.

For instance, the record does show that all witnesses as to Lowell E. Womack in case No. 396 in this court or 16584 in the Supreme Court of Georgia were called and were cross examined by the counsel for Womack (R. 209, 210, 211, 213, 215, 216, 222), except Roy Shell and he was present in court for the purpose of being cross examined.

The Supreme Court of Georgia has held in Warner v. Martin, 124 Ga. 287, 390, that in contempt cases:

> "The general rule seems to be, that the questions of contempt or no contempt *may be decided upon*

> *affidavits*, where the chancery rule is in force that the answer of the contemnor is not conclusive." Rapalje on Contempts, Sec. 120, 126. 'In proceedings for contempt for the violation of an injunction, the usual method of proving the fact of violation is by affidavit.' 2 High on Inj. Sec. 1452. See also 1 Beach on Inj. Sec. 262; State v. Harper's Ferry Bridge Co., 16 W. Va. 464; Una v. Dodd, 38 N. J. Eq. 460; Witter v. Lyon, 34 Wis. 564; People v. Brower, 4 Paige (N. Y.) 405; State v. Mitchell, 3 S. D. 223; Rutherford v. Metcalf, 5 Hayw. (Tenn.) 58. "So far as we know to the contrary it has been the practice in the courts of this State to admit affidavits in evidence on the hearing of proceedings for contempt for the violation of an injunction. Among the cases where such practice was followed may be cited, Howard v. Durand, 36 Ga. 346, Thweatt v. Gammell, 56 Ga. 98, and Hayden v. Phinizy, 67 Ga. 758. (Italics supplied.)

And in Falls City Mfg. Co. v. Athens Coca-Cola Co., 130 Ga. 559, 561, where affidavits were admitted in evidence over objections that they were not properly entitled, the Court said:

> "Where a proceeding in attachment is brought by one of the parties to a case, for the purpose of enforcing an interlocutory injunction granted in favor of one of the litigants against others . . . if affidavits are entitled in the name of the main case, they will not be subject to rejection from evidence on that ground, when offered on the hearing of the attachment proceeding."

There was no objection to the introduction of the affidavits, and no assignment of error on their admission in evidence, neither is there any showing whatever that the petitioners were denied the right to examine any witness or any of the affiants.

CONCLUSION

The respondent respectfully submits that this Court does not have jurisdiction to entertain this writ because no Constitutional question is involved, and no Constitutional right or privilege has been denied the petitioners.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

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No. 394 A. C. CARROLL, et al., *Petitioners*
No. 395 S. T. ALRED, et al., *Petitioners*
No. 396 LOWELL E. WOMACK, *Petitioner*
No. 397 S. T. ALRED, et al., *Petitioners*
No. 398 J. D. PEDIGO, et al., *Petitioners*
No. 399 LOWELL E. WOMACK, *Petitioner*

v.

CELANESE CORPORATION OF AMERICA,
Respondent

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

This case presents an issue which has rarely come before this Court but which arises often in state trial courts. That issue is whether defendants in a criminal contempt proceeding are entitled to the procedural protections of the due process clause.

While many northern and eastern states have anti-injunction legislation patterned after the Norris-LaGuardia Act, such legislation is wholly lacking in perhaps the majority of states. And in many states, particularly in the south, use of the labor injunction is markedly on the increase.

The CIO, because it is a federation of labor unions, and particularly because its efforts to organize workers in the

southern states have been seriously hampered by widespread use of the labor injunction, has an immediate interest in the question of the procedural rights of strikers accused of violating labor injunctions.

This brief *amicus* is filed with the consent of both parties.

QUESTION PRESENTED

Whether defendants in a criminal contempt proceeding are entitled to the procedural protections of the due process clause, and particularly whether such defendants are entitled to the benefits of the reasonable doubt rule, or may be convicted upon a mere preponderance of the evidence.

STATEMENT

During a strike at respondent's plant in Rome, Georgia, a state trial court issued a temporary restraining order regulating picketing and other activities of the strikers. Petitioners were cited for contempt of this order, and after a trial, the trial court "found the evidence to preponderate against" the petitioners (R. 258, 259, 281, 301), and adjudged them to be "guilty of civil contempt" (R. 47, 158, 205). Petitioners appealed to the Supreme Court of Georgia from the judgment finding them guilty of civil contempt.

In applying the preponderance of the evidence rule against the petitioners, rather than the reasonable doubt rule, and in adjudging them guilty of civil contempt rather than of criminal contempt, the trial court followed the then latest decision of the Supreme Court of Georgia in *Wagner* v. *Commercial Printers*, 203 Ga. 1.

Thereafter the strike was settled. As part of the settlement the respondent agreed with the union not to oppose motions by petitioners for permanent stays of execution of the contempt judgments. Moreover, since the sole purpose of a civil contempt proceeding is to secure obedience to the court decree for the benefit of the successful litigant, it is the rule both in Georgia and elsewhere that a civil contempt proceeding abates upon the settlement of the main cause. Nevertheless, the trial

judge refused to issue stays of execution of the contempt judgments. Petitioners appealed this issue also to the Supreme Court of Georgia.

The Supreme Court of Georgia thereupon overruled its decision in the *Wagner* case, and held that the contempts in the present cases were criminal rather than civil (R. 319). Accordingly, it held that the contempt judgments did not abate with the settlement of the underlying litigation.

REASONS FOR GRANTING THE WRIT

The issue which this case presents is whether the due process clause of the Fourteenth Amendment requires that a defendant in a criminal contempt case be given the benefit of the reasonable doubt rule which normally applies in criminal cases, or whether such a defendant may, consistently with due process, be convicted upon a mere preponderance of the evidence.

The general question of the procedural rights under the Constitution of a defendant in a criminal contempt case was recently considered by this Court in *In Re Oliver*, 333 U. S. 257. And the Court there held that the procedural protections of the due process clause extend in full measure to a defendant in a criminal contempt case, with the exception of cases involving misconduct in open court in the personal presence of the judge. This Court declared (pp. 275-276):

> Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case [Cooke v. United States, 267 U. S. 517] requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority * * * before the public." If some essential

> elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out.

While *In Re Oliver* did not involve the specific question, here presented, whether due process requires that the reasonable doubt rule, rather than the preponderance of the evidence rule, be used in a criminal contempt case, it does stand squarely for the proposition that defendants in criminal contempt proceedings are entitled to the procedural protections which the due process clause extends to defendants in ordinary criminal cases. And this Court has often declared that a defendant in a criminal contempt proceedings is constitutionally entitled to the reasonable doubt standard. *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 444; *Michaelson* v. *United States*, 266 U. S. 42, 66. In the *Gompers* case (p. 66) the court pointed out that there were differences between criminal and contempt proceedings—

> which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and he cannot be compelled to testify against himself.

While these cases involved criminal contempt cases in the federal courts, it will be noted that this Court had no hesitation in declaring that the defendant had a constitutional right to the application of the reasonable doubt rule. No basis is perceived under the constitution for any different result in a state court proceeding.

This Court has likewise held that the reasonable doubt rule is a constitutional requisite of procedural due process in ordinary criminal cases both in the federal courts, *Warszower* v. *United States*, 312 U. S. 342, 347, 348, and in the state courts, *Cockrill* v. *California*, 268 U. S. 258, 261; *Bailey* v. *Alabama*, 219 U. S. 219, 234. And we have already seen that in the *Oliver* case this Court held that the normal guarantees of

procedural due process extend to defendants in criminal contempt cases, excepting only those involving contempts committed in the presence of the judge.

In all probability the decision below cannot be reconciled with these decisions of this Court. At the least, the decision below presents a difficult and important question of constitutional law which should be decided by this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writ of certiorari should be granted.

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